IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.11.2006

CORAM:

THE HONOURABLE MR. JUSTICE V. DHANAPALAN

C.M.A. No.240 of 1998

Sharli Sunitha — Appellant/Petitioner

vs.

D. Balson — Respondent/Respondent

Civil Miscellaneous Appeal filed under Section 47 of the Guardians and Wards Act, 1890, against the judgment and decree dated 06.10.1997 made in O.P. No.40 of 1996 on the file of the District Court, The Nilgiris at Uthagamandalam.

For appellant — Mrs. Hema Sampath

For respondent — Mr. V. Sairam

J U D G M E N T

This Civil Miscellaneous Appeal is directed against the judgment and decree dated 06.10.1997 passed by the District Court, Nilgiris (in short "the Tribunal) in O.P. No.40 of 1996.

2. Sharli Sunitha who is the appellant herein filed a petition under Sections 7 to 10 and 25 of the the Guardians and Wards Act, 1890, before the Tribunal against her husband/respondent herein, seeking guardianship of their child by name Aldheeya.

3. The case of the appellant in brief is as under:

a. The marriage between the appellant and the respondent who belong to Christianity took place on 22.06.1991 and the appellant gave birth to a child named Aldheeya on 05.04.1992. In 1993, the appellant left her matrimonial home due to difference of opinion with the respondent and the respondent filed O.P. No. 13 of 1994 seeking guardianship of their child and on the basis of a memo to the effect that the respondent can meet the child every Sunday between 3 p.m. and 5 p.m. at Holy Velankanni Church, Kothagiri, the petition was dismissed as not pressed.

b. Subsequent to this, the parties were living happily for a few months. But, the respondent had started ill-treating the appellant once again and since the appellant was all alone in their house, she was subject to mental agony and consequent deterioration of health. Hence, on 25.03.1996, after informing

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the respondent over phone, the appellant had left for her aunt's house taking the child with her. But, the very next day, the respondent and his elder sister had taken the child from the appellant saying that they would give back the child once she recovered from her illness. On 02.09.1996, when the appellant had come to her matrimonial house with the intention of living together with the respondent, she was ill-treated. With a view to render motherly care and affection and considering the fact that the respondent would be fully engaged in his work all through the day, the appellant filed the Original Petition seeking guardianship of the child.

4. The respondent-husband contested the case by filing his counter and his case is as follows:

The appellant did not leave the matrimonial house on account of misunderstanding with him but she had done so since it was really her habit to leave the matrimonial home quite frequently without even informing him. The appellant had illicit relationship with his sister's husband Benson and she had left with him for Chennai on 25.03.1996 and stayed in an hotel at Chennai and not in her aunt's house as claimed by her. The appellant phoned up to the respondent's sister saying that the respondent can collect the child from one Jothinathan's house and accordingly, the respondent went to Chennai on 26.03.1993 and took the child. The appellant who has illicit affair with Benson may run away any time and since the respondent owns a workshop, he can work as and when required and as such, he can take care of the child with the help of his sister who has also got two children.

5. On the side of the appellant, she was the only witness and four documents were marked and on the side of the respondent, four witnesses were examined and five documents were marked and the Tribunal, on an analysis of the oral and documentary evidence, dismissed the petition holding that the child should be under the guardianship of the respondent against which the present appeal.

6. Heard both sides.

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7. Mr. R. Subramanian, learned counsel for the appellant would contend that the Tribunal went wrong in holding that the appellant went away with Benson. It would be his further contention that the Tribunal has grossly erred in dismissing the petition without even considering the tender age of the child. It was also his strenuous contention that the Tribunal has erred in holding that the appellant was not employed and she does not have the wherewithal to maintain the child.

8. Contending contra, Mr. V. Sairam, learned counsel for the respondent would contend that the appellant is always in the habit of leaving her matrimonial home and is not at all interested in the welfare of her child. He would further contend if the child is in the custody of the respondent, it would be taken care of by the respondent's sister and it can grow along with the two children of

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the respondent's sister and hence, the Tribunal is correct in dismissing the original petition.

9. The point for determination in this appeal is whether the appellant is eligible to take care of the child.

10. While deciding the above point, some useful reference could be made to a decision of a Division Bench of the Kerala High Court in the case of Munnodiyil Peravakutty vs. Kuniyedath Chalil Velayudhan reported in AIR 1992 KERALA 290: para 6)

> "Capacity of the custodian to supply the daily necessities such as food, clothing and shelter is the primary consideration. Secondly, the education of the child. The custodian must possess the capacity to create surroundings in which the child will be in touch with education. In the case of a custodian who is himself educated and given to reading and writing, it is easier for the child to keep itself abreast of letters. If the custodian is not educated, he cannot create the requisite background in the home. Thirdly, awareness of the need to keep good health and the capacity to provide the means of keeping good health is another important factor. Fourthly, a knowledgeable parent would greatly contribute to the child's welfare by taking steps like emphasising health eating habits, providing for vaccination, other measures of health care, timely treatment and company of books. Less educated or ignorant parents may not be able to create these conditions. Fifthly, the economic capacity to educate in a good school, with private coaching, where necessary, meeting expenses of transport, children's excursions and so on is no less an important factor.
>
> We do not suggest that the question of custody should be decided upon consideration as to which of the two rival claimants is more affluent. While economic condition of a claimant to the custody is an important factor, no less important a factor is: which of the rival claimants to the custody show greater concern for the welfare of the child? The child does not grow merely on food and clothing. The growth of its personality needs love of parents, the denial of which warps the mind and distorts the vision of life. A barren life, devoid of emotional attachment, love of parents, brothers and sisters and even of friends, retards and impairs growth of a child.

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therefore, the sum and substance of the matter is: neither economic affluence nor a deep mental or emotional concern for the well-being of the child, by itself, is determinative of, where the welfare of the child lies. the answer depends upon the balancing of all these factors and determining what is best for the child's total well-being. that is what we now propose to do."

11. Admittedly, the appellant had gone to Chennai to her aunt's house on 25.03.1996 on the ground that she was feeling very aloof and that she was also very weak. In this context, I am of the view it is unnecessary to go into the question as to whether the appellant was having illicit relationship with Benson or not. She has neither stated in her petition nor in her deposition as to what was her exact illness. If she were really unwell, she could have examined the doctor who treated her or at least could have produced the Medical Certificate to prove her illness. But, she has failed to do either of these two. Further, her deposition that she feels aloof sounds to be amusing because a lady with a child of a tender age can in no way feel aloof. Instead, she will have to run short of time in taking care of the child during its pre-school stage and even when the child attains school-going age, she may be fully occupied in preparing the child in sending her to school and assisting her in her homework after return from school in the evenings.

12. Secondly, even according to her, had she really left her matrimonial home as she was feeling very lonely, there is absolutely no need for her to leave her matrimonial home all of a sudden just by making a phone call to her husband. Rather, she could have very well waited till the respondent's arrival and could have explained her pitiable plight. Even this has not been done. Thirdly, she has deposed that she had taken her child even when her examinations were going on. From this, there is no other option except to draw an inference that she was not bothered of her daughter's education and she was only interested in going out of home. Thus, these three instances would only go to indicate that she was not interested in the welfare of the child.

13. Next, according to her oral evidence, she was working as a teacher in a school for a salary of Rs.2,000/-. She has also admitted that she is not a graduate. Though she had marked her Salary Certificate, the person who issued the same was not examined. In such a case, her claim that she is earning Rs.2,000/- per month as a teacher is too big a pill to swallow. Next, her contention is that her father is employed at Kothagiri for a salary of Rs.5,000/- per month and her mother is employed as an assistant in a beauty parlour at Coimbatore. But, to prove this, she has not even examined her father nor her mother as witness. Even assuming that the parents are employed, since the appellant's father is employed at Kothagiri and her mother is employed at Coimbatore, they can, in no way, be helpful in taking care of the child in question. Thus, in short, it appears that the appellant is sound neither monetarywise nor does she have people around her to make her child grow into a well-educated and responsible girl.

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14. On the other hand, there is no dispute over the fact the respondent-father owns a workshop. The appellant-mother herself has admitted this in her evidence. Thus, as far as the monetary aspect is concerned, it can be said that the respondent-father will definitely be in a much better position when compared to the appellant-mother in providing basic necessities of life and education to the minor girl. That apart, the respondent-father has got with him, his unemployed mother and his elder sister as well who is residing nearby with her two children. This assures the minor girl of love, affection and guidance. Even assuming that the minor girl is yet to attain the stage of puberty, she has got her paternal grandmother and R.W.2 to relate her in matters which would concern a growing girl during her period of puberty. Thus, the requirements of the minor girl, in all respects, would be best satisfied if she is in the custody of the respondent-father.

15. In view of the above findings and the principles set out in the judgment of the Division Bench of Kerala High Court (supra), it is clear that the appellant-mother is not a proper person for the child to grow with and it is only the respondent-father who will be a better choice of the two. Hence, I hold that the Tribunal has rightly dismissed the original petition filed by the appellant and as such, I find absolutely no merit to consider in the appeal and accordingly, it fails and stands dismissed. No costs.

cad

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

To
1. The District Judge, The Nilgiris, Uthagamandalam
2. The Record Keeper, V.R. Section
High Court of Madras

+ one cc to Mrs. Hema Sampath, Advocate sr no. 56333

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